Supreme Court, U.S.
FILED
JAN 21 1993
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No. 92-1080

In The

Supreme Court of the United States

October Term, 1992

WILLIAM STEPHENSON,

Petitioner,

vs.

McLEAN CONTRACTING COMPANY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court ought to grant a Petition for Writ of Certiorari where the decision below lay within the sound discretion of the court and was correctly decided under the legal standards prevailing in all circuits.

AFFILIATED CORPORATIONS

The Respondent is affiliated with no other corporations, except wholly-owned subsidiaries.

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STATEMENT OF THE CASE

This Petitioner is now before the Court for the second time in this case. Reviewing the chronology, Petitioner was injured on March 26, 1986 and brought suit against his employer, Respondent, under the Jones Act, 46 U.S.C. § 688, and under general maritime law. After trial began but prior to verdict, the trial court granted Respondent's motion for summary judgment on the ground that as a matter of law, Petitioner did not satisfy the third prong of the Jones Act test of seaman status under *Whittington v. Sewer Construction Co.*, 541 F.2d 427 (4th Cir. 1976), because his duties did not serve in aid of navigation or the transportation function of a vessel, and the situs of his injury was non-maritime in nature. *Stephenson v. McLean Construction Co., Inc.*, 702 F. Supp. 552, 554 (D. Md. 1988). As found by the court, Petitioner was working as a welder on a bridge construction project and was generally assigned to perform welding duties on and off the floating barges at the work site. At the time of his injury, Petitioner was doing welding work, not on a barge, but "in a cofferdam, box-like work structure surrounding a concrete foundation embedded in the river bottom." *Id.* at 553.

On appeal, the Fourth Circuit affirmed the decision of the district court, *Stephenson v. McLean Contracting Co., Inc.*, 863 F.2d 340 (4th Cir. 1988). This Court thereafter denied a timely Petition for Writ of Certiorari. *Stephenson v. McLean Contracting Co., Inc.*, 460 U.S. 1085 (1989).

Almost two years elapsed and then this Court, in *McDermott International Inc. v. Wilander*, 111 S. Ct. 807 (1991), resolved the conflicting decisions among the circuit courts of appeal by holding that it was not necessary for a Jones Act plaintiff to show duties in furtherance of the navigation or transportation function of a vessel, as the Seventh Circuit had ruled in *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert.*

denied, 469 U.S. 1211 (1985), but merely to demonstrate job activities furthering the purpose of the vessel, which was the test originally adopted by the Fifth Circuit in *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959).

Petitioner then promptly filed a motion under Rule 60(b), F.R.C.P. to set aside the judgment against him and to reopen the case for further proceedings in the light of *McDermott*. After consideration, the district court denied Petitioner's motion on the ground that since Petitioner advanced no other basis, the *McDermott* decision standing along did not represent circumstances of such an unusual or extraordinary nature as to justify overturning a closed and settled judgment (Petitioner's Brief,, A8, *et seq.*). On appeal, the Fourth Circuit sustained the decision of the district court (A1, *et seq.*). This Petition then followed.

SUMMARY OF ARGUMENT

Petitioner attempts to make a specious distinction between "change" in the law and "clarification," as evidenced in this Court's decision in *McDermott International, Inc. v. Wilander, supra*. For reasons Petitioner does not clearly explain, *McDermott* represents more than a mere change or evolution of the law and Petitioner should, therefore, be given an opportunity to reopen the final judgment against him and proceed on the merits under *McDermott*.

The district judge properly held that Petitioner had shown no compelling or extraordinary circumstances justifying relief.

Petitioner then advances an argument that while the decisions below may be a correct application of prior law of the Fourth Circuit, and a majority of the circuits, Petitioner asserts that there is a conflict among the circuits as to whether a change in law,

standing alone, is sufficient justification to set aside a final judgment. Respondent strongly disputes the existence of such a conflict.

Therefore, this case falls within settled policy of the Court denying Petitions in cases involving discretionary rulings of lower courts where only the interest of the litigants is involved.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S GROUNDS FOR RELIEF

Petitioner argues that it is inequitable in this case to refuse to grant the Petition and permit him to go forward on the merits (Brief 16-18), because *McDermott International, Inc. v. Wilander, supra,* represents something more than a mere change in the law and must be given something akin to retroactive effect (Brief 9-11). Petitioner then argues that if *McDermott* signifies only a change in law, there is a conflict among the circuits as to whether that alone justifies the grant of a Rule 60(b)(6) motion (Brief, 11-16, 18).

Respondent is mindful that the Court will intervene in Rule 60(b) cases where it feels manifest and serious injustice has been done, *see, e.g., Klapprott v. United States,* 335 U.S. 601 (1949), but Petitioner must show extraordinary circumstances in order to justify the setting aside of a final judgment. *Ackermann v. United States,* 340 U.S. 193 (1950). The circuit courts of appeal are unanimous that a change in decisional law, without more, will not justify disturbing a final judgment under Rule 60(b)(6).

A. Change Versus Clarification

The courts below found that Petitioner had advanced no basis for disturbing the final judgment in this case other than the fact that

the *McDermott* decision erased that portion of the Jones Act status test which formed the basis of the judgment. Petitioner argues the final judgment against him must be reopened so that *McDermott* be given effect, but, as the Fourth Circuit observed, the *McDermott* decision does not state that it is to apply retroactively (A7). Moreover, Petitioner's argument on this point is obscure. As the district judge noted (A19-21), Petitioner's attempt to buttress his position by claiming that *McDermott* did not change, but instead, clarified the law, really amounts to mere semantics. *Cf. Polites v. United States*, 364 U.S. 426, 433 (1960). In fact, *McDermott* did require a prospective change in the Fourth Circuit's Jones Act status test (A3). *Harwood v. Partredereit*, 944 F.2d 1187 (4th Cir. 1991). The district judge noted that even if the relief were granted, it is not clear that there would be a change in outcome. *See Teamsters, Chauffeurs Local No. 59 v. Superline Transportation Co.*, 953 F.2d 17 (1st Cir. 1992).

What is at work in this case, as in all similar Rule 60(b) cases, is "a healthy respect for the finality of judgments," so that a party seeking Rule 60(b) relief "must bear a heavy burden" because "such relief is extraordinary and may be granted only upon a showing of 'exceptional circumstances'." *Mayberry v. Maroney*, 558 F.2d 1159, 1163 (3rd Cir. 1977 - *citation omitted*). *Ackermann v. United States*, 340 U.S. 193 (1950). As was noted by the district judge, Petitioner is in no different position than any litigant who has suffered an adverse judgment, after which the law has changed (A21).

Because Petitioner cannot find support for his position, he is then forced to treat *McDermott* as a change or evolution of the law, but mistakenly states that the circuits are in conflict as to the effect of this on final judgments when considering Rule 60(b) motions (Brief 13-16, 18).

II.

NO CONFLICT AMONG THE CIRCUITS EXISTS.

Petitioner concedes that the Second, Fourth, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits agree that standing alone, a change in the law following a final judgment is not an extraordinary circumstance justifying reopening a final judgment under Rule 60(b)(6) (Brief 15). Although not cited by Petitioner, the First Circuit also follows that rule. *United States v. Belanger*, 598 F. Supp. 598 (D. Me. 1984); *Brown v. Clark Equipment Co.*, 96 F.R.D. 166 (D. Me. 1982). However, Petitioner asserts that the Third and Tenth Circuits would permit a reopening on subsequent change of law (Brief 13).

A. Third Circuit

To support his position, Petitioner cites *Wilson v. Fenton*, 684 F.2d 249 (3rd Cir. 1982), but that case does not prove Petitioner's point, because the court there found that the change in law did not render nugatory the earlier decision of the district judge. The settled authority in the Third Circuit appears to be *Mayberry v. Maroney*, 558 F.2d 1159 (3rd Cir. 1977), in which the Commonwealth of Pennsylvania sought relief, under Rule 60(b)(6), from a consent judgment barring it from certain practices in correctional facilities on the ground that circumstances had changed. The district court granted relief; the Third Circuit reversed holding that the issue under Rule 60(b)(6) "is whether the Commonwealth offered sufficient evidence of circumstances so exceptional that our overriding interest in the finality and repose of judgments may properly be overcome." *Id.* at 1164.

The Third Circuit in the *Mayberry* case also turned aside an argument that a decision of this Court following the entry of the consent order cast doubt on the wisdom of the entry of the order, by stating that even assuming that a change in decisional law had

occurred, "it is settled that Rule 60(b)(5) does not contemplate relief based merely upon precedential evolution." *Ibid.* Since the circuit court considered the case under Rule 60(b)(6) as well, it can be fairly assumed that relief under that subsection would be equally unavailing. *See Seese v. Volkwagenwerk, A.G.*, 679 F.2d 336 (3rd Cir. 1982); *cf. Marshall v. Board of Education*, 575 F.2d 417 (3rd Cir. 1978).

The Third Circuit is, therefore, clearly in line with all other circuits.

B. Tenth Circuit

Petitioner quotes from *Adams v. Merrill Lynch Pierce Fenner and Smith*, 888 F.2d 696 (10th Cir. 1989), a broad statement that a change in relevant case law warrants Rule 60(b)(6) relief. Petitioner does not place that statement in the context of the facts of that case, which, indeed, are critical if the quotation from the decision is to be properly understood.

Adams is a very fact-specific decision. It arose out of suits for violations of federal and state securities law, common law breach of fiduciary duty and of contract, and common law negligence. The brokerage agreements before the court contained arbitration provisions, but the aggrieved investors brought all claims in federal court. The defendant broker moved to compel arbitration and to stay proceedings until the outcome of arbitration. The lower court granted the motion except as to the federal claims which it refused to place over into arbitration, although it did grant the stay as to them.

There the matter rested until, two years later, this Court decided a case which indicated that the refusal to order arbitration of the federal claims was in error. In two separate motions under Rule 60(b)(6), the defendant asked the court to reopen its prior order and to compel arbitration of the federal claims, all of which

were still subject to the stay order. Both motions were ultimately granted by the district judge, and all original claims were then subjected to arbitration. The lower court justified its action based on an evolution of decisional law of this Court, and the Tenth Circuit affirmed.

Note must be taken of two critical points in *Adams*. First, the Rule 60(b)(6) motion was addressed to a *continuing* order of the district judge staying action on the federal claims pending the outcome of arbitration. Therefore, nothing was final, and in fact, the Tenth Circuit noted that an order compelling arbitration is ordinarily not a final order for purposes of appeal, saving only under the peculiar circumstances of that case. *Id.* at 698-9.

Second, the order compelling arbitration did not dispose of the plaintiffs' claims, nor did it decide any issue on the merits; it merely forced the plaintiffs into another forum for the redress of their grievances, a forum which the court found they had agreed to by contract. Since the circuit court noted that arbitration clauses are fair and enforceable, *Id.* at 700, the plaintiffs were clearly not prejudiced by the district court's order compelling arbitration.

Adams is in harmony with decisions from other circuits. For example, as was said in *Ritter v. Smith, supra:*

> Generally courts have refused to undo the past, executed effects of the judgments, but they have, almost uniformly, recognized that it would be unjust to give prospective effect to a judgment now known to be improper.

811 F.2d at 1402. the Fourth Circuit also follows the rule that an order with continuing effect is subject to modification under Rule 60(b)(6) when applicable law changes. *See, e.g., Patterson v. American Tobacco Co.*, 634 F.2d 744 (4th Cir. 1980); *E.E.O.C. v.*

Baltimore & Ohio Ry. Co., 557 F. Supp. 1112 (D. Md. 1983).

An examination of other authority from the Tenth Circuit shows that it follows the universal rule that mere change in the law will not support a motion to disturb a final judgment. In *Collins v. City of Wichita*, 254 F.2d 837 (19th Cir. 1958), a case closely on point, in denying a Rule 60(b) motion, the circuit court stated:

> Litigation must end some time, and the fact that a court may have made a mistake in the law when entereing judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside.

Id. at 839. *Accord E.E.O.C. v. Safeway Stores, Inc.*, 611 F.2d 795 (10th Cir. 1979). *Cf., Fleming v. Gulf Oil Corp.*, 547 F.2d 908 (10th Cir. 1977 — motion granted where lower court had no legal authority to pass original order), and *Pierce v. Cook & Co., Inc.*, 518 F.2d 720 (10th Cir. 1975 — explained as being consistent with the general rule in *Ritter v. Smith, supra*, 811 F.2d at 1403).

The Tenth Circuit, therefore, follows the rule adopted in all other circuits.

C. Eighth Circuit

Petitioner cites *Cox v. Wyrick*, 873 F.2d 200 (8th Cir. 1989), for the proposition that a change in law which is *retroactive* in nature may, under appropriate circumstances, provide the basis for Rule 60(b) relief. This is also the rule in the Fourth Circuit. *Compare United States v. Mandel*, 672 F. Supp. 864 (D. Md. 1987 — writ of error *coram nobis* granted where retroactive change of law rendered prior judgment void), *with Hall v. Warden*, 364 F.2d 495 (4th Cir. 1966 — Rule 60(b) motion denied where judgment final and change of law was not retroactive).

Cox, therefore, represents no departure from the general rule. In fact, the Eighth Circuit follows all other circuits in denyng relief under Rule 60(b) where the only grounds advanced for disturbing a final judgment is that the law has subsequently changed. *Carter v. Romines*, 593 F.2d 823 (8th Cir. 1979).

There is, therefore, no circuit court of appeals which does not follow the general rule, and thus there is no conflict among the circuits for the Court to resolve.

III.

POLICY OF THIS COURT REQUIRES DENIAL.

The courts below found that Petitioner's Rule 60(b) motion proceeded under subsection (6), which invokes the exercise of sound judicial discretion by the district judge, restricting appellate review to whether the district court abused its discretion. *See, e.g., United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657 (1st Cir. 1990); *Wilson v. Fanton*, 684 F.2d 249 (3rd Cir. 1982); *Hensley v. Chesapeake & Ohio Ry. Co.*, 651 F.2d 226 (4th Cir. 1981); *Fackelman v. Bell*, 564 F.2d 734 (5th Cir. 1977); *McKnight v. United States Steel Corp.*, 726 F.2d 333 (7th Cir. 1984); *Mohammed v. Sullivan*, 866 F.2d 258 (8th Cir. 1989); *Tomlin v. McDaniel*, 865 F.2d 209 (9th Cir. 1989); *Adams v. Merrill, Lynch, Pierce, Fenner & Smith*, 888 F.2d 696 (10th Cir. 1989); *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987).

Since there is no conflict among the circuits for the Court to resolve, the Petition ought to be denied under the long-standing policy of this Court of avoiding decisions which impact only a particular litigant. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). Stated differently, were the Petition to be granted, the Court would find itself in the position of reviewing an action of the district judge which involved the exercise of sound judicial

discretion, a matter which the Court ordinarily has treated with deference. *See, e.g., Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384 (1990). *See Mitchell v. Hobbs*, 951 F.2d 417, 420 (1st Cir. 1991) — review of Rule 60(b) decision); *Heat and Control, Inc. v. Hester Industries, Inc.*, 785 F.2d 1017, 1022 (Fed. Cir. 1986 — review of discretionary decision to quash a subpoena).

The absence of a conflict among the circuits removes any real purpose for the granting of the Petition in this case. In *Layne & Bowler Corporation v. Western Well Works, Inc.*, 361 U.S. 387 (1923), a patent infringement case, this Court had granted a petition for writ of certiorari in order to resolve an apparent conflict among circuits. The Court found in that case that the conflict was more apparent than real, and dismissed the writ accordingly, thus the language of Chief Justice Taft's opinion applies with equal force in the present case:

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal.

261 U.S. at 393. See also Justice Frankfurter's dissent in *McAllister v. United States*, 348 U.S. 19, 25 (1954). Because there is no conflict among the circuits for the Court to resolve, and because this case involves only a single litigant and no broad public policy or interest is present, the Court ought to deny the Petition. Additionally, the decision of the district judge was entirely in harmony with the decisions of all the circuits, so that there is nothing for the Court to correct were it to grant the Petition.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari not be granted.

Respectfully submitted,

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APPENDIX A — FEDERAL RULE OF CIVIL PROCEDURE 60

RULE 60. Relief From Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, order or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistakes, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore dominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a

defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.